STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
JAMES E. ELLETT	:	DETERMINATION DTA NOS. 818134
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1996, 1997 and 1998.	:	AND 818135

Petitioner, James E. Ellett, c/o 5171 Rt. 32, Catskill, New York 12414, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1996, 1997 and 1998.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 17, 2001 at 10:00 A.M., with all briefs to be submitted by August 14, 2001, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kathleen D. O'Connell, Esq., of counsel).

ISSUES

I. Whether petitioner's wage income was subject to New York State personal income tax.

II. Whether, under the instant circumstances, a frivolous petition penalty pursuant to Tax Law § 2018 and 20 NYCRR 3000.21 should be imposed.

FINDINGS OF FACT

1. In 1996, petitioner, James E. Ellett, earned $55,439.80 in wage income from Central Hudson Gas & Electric Corporation of Poughkeepsie, New York. Petitioner's employer withheld New York State income tax of $3,201.56 from these wages.

2. Petitioner timely filed a 1996 New York State resident personal income tax return. He reported $55,439.80 in wage income on line 1 of the return and included the same amount in his Federal adjusted gross income of $55,798.04, reported on line 18 of the return. Petitioner then subtracted his reported wage income from his Federal adjusted gross income on line 28 as a "New York subtraction." He identified the subtraction as "non-taxable compensation." This resulted in reported New York adjusted gross income of $358.24. After taking a standard deduction, the return reported zero New York taxable income and claimed a refund in the amount of New York income tax withheld by his employer, i.e., $3,201.56. The Division of Taxation ("Division") paid the claimed refund.

3. The Division later audited petitioner's 1996 return and determined that petitioner's claimed New York subtraction was improper. The Division thus determined petitioner's 1996 New York adjusted gross income to be $55,798.00. After allowing a standard deduction of $6,500.00, the Division calculated taxable income of $49,623.00 with tax due thereon of $3,275.00.

4. On February 28, 2000, the Division issued to petitioner a Notice of Deficiency which asserted $3,275.00 in income tax due for the year 1996, plus penalty and interest.

5. In 1997, petitioner earned $60,140.75 from Central Hudson Gas & Electric Corporation. Petitioner reported such income on his timely filed 1997 New York State resident

return and included that amount in his calculation of New York adjusted gross income. Petitioner itemized his deductions on his 1997 return and, in addition to itemized deductions for taxes, interest and charitable contributions, petitioner claimed a miscellaneous deduction (from Federal Schedule A, line 27) in the amount of his wage income. This deduction resulted in reported taxable income of zero and a refund claimed in the amount of New York income tax withheld from his wages, $3,197.83. The Division issued petitioner a refund in the claimed amount.

6. The Division subsequently audited petitioner's 1997 return. In response to a Division request, petitioner provided the Division with a copy of his 1997 Federal Schedule A. On line 27 of this schedule ("other miscellaneous deductions") petitioner claimed a deduction of $60,140.75 identified as "non-taxable comp. (as per U.S. constitution)." The Division disallowed this claimed deduction and recomputed petitioner's 1997 New York income tax liability accordingly. Specifically, the Division determined $53,843.00 in taxable income and $3,290.00 in tax due.

7. On February 28, 2000, the Division issued a Notice of Deficiency to petitioner which asserted $3,290.00 in personal income tax due for 1997, plus penalty and interest.

8. In 1998, petitioner earned $58,395.36 in wages from Central Hudson Gas & Electric Corporation, which withheld $3,038.72 in New York income tax from such wages. Similar to his 1997 return, petitioner claimed a miscellaneous itemized deduction in the amount of his wage income. This deduction formed the basis for a claimed refund of $3,020.72. The Division paid the claimed refund. Later, the Division audited petitioner's 1998 return. In response to a Division request, petitioner provided the Division with a copy of his 1998 Federal Schedule A. Petitioner claimed a miscellaneous deduction of $58,395.36 on line 27 of the Schedule A,

explained on the schedule as "non-taxable compensation." The Division disallowed this claimed deduction and recomputed petitioner's taxable income to be $51,944.00 and his tax liability to be $3,160.00.

9. On January 18, 2000, the Division issued a Notice of Deficiency to petitioner which asserted $3,160.00 in tax due, plus penalty and interest, for the year 1998.

10. During its audits of the returns for the years at issue, the Division requested certain documentation from petitioner, who responded with a list of brief excerpts from four decisions of various courts which make reference to, among other issues, distinctions between profit and wages and compensation for labor. Petitioner's response also included a statement that New York State Tax Law follows Federal law "relative to the determination of income for federal income tax purposes." The Division responded by advising petitioner in correspondence that it considered the position taken by petitioner on audit to be frivolous.

11. Following the issuance of the notices of deficiency petitioner filed requests for conciliation conferences with the Bureau of Conciliation and Mediation Services ("BCMS"). Petitioner's requests stated the following as the basis for the disagreement with the notices:

> I receive compensation for labor, which is non-taxable by the Federal government under the individual income tax system. Since New York State income tax system follows the Federal government income tax system, my compensation is therefore not taxable by New York State for income tax. That is why I do not owe any of the "amount due."

12. BCMS issued orders sustaining the statutory notices and petitioner subsequently filed petitions with the Division of Tax Appeals each of which made the following assertions:

> 1) The Commissioner of Taxation and Finance, or his representative, made the incorrect assumption that I am a person liable for the New York State personal income tax, as it is written.

> 2) I intend to prove New York State income tax law, Article 22, personal income tax, by law shall be construed to follow the federal income tax laws. I will prove that I am not a person liable for the federal individual income tax and therefore, not a person liable for the New York State personal income tax, under law.

13. In its answers filed in response to the petitions and at the commencement and close of the hearing, the Division requested that the Division of Tax Appeals impose the maximum penalty for filing a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

14. At hearing petitioner submitted documentation indicating that he had filed Federal returns during the years at issue on which he claimed miscellaneous deductions in the amount of his wage income resulting in a zero reported tax liability and a refund claim of tax withheld. For the years 1997 and 1998 virtually no Federal income tax was withheld from petitioner's wages. As was the case initially with petitioner's New York returns, the Internal Revenue Service paid the claimed refunds. There is no evidence in the record, however, that the Internal Revenue Service asserted tax deficiencies against petitioner for any of those years.

15. Petitioner was born in the United States of America. At all times relevant herein he was a New York resident.

SUMMARY OF PETITIONER'S POSITION

16. At hearing petitioner expanded on the argument contained in his petitions. He noted that the starting point for determining New York taxable income under Article 22 for a resident individual such as himself is Federal adjusted gross income. He asserted, however, that he was not subject to Federal income tax and therefore was not liable for any New York income tax during the years at issue. Petitioner's claim that he was not subject to Federal income tax rests on his stated contention that he was not a citizen of the United States. Rather, petitioner claimed he was a citizen of New York State and that New York was sovereign over the United States.

17. Petitioner also asserted that the issuance of refunds by the Internal Revenue Service for the years at issue constituted an acceptance or endorsement of his position that his wage income was not subject to Federal income tax. Based on this assertion, petitioner claimed that since New York follows Federal tax law, New York must accept his returns for the years at issue as filed.

18. At hearing petitioner expressly abandoned the argument (apparently made during the audit) that wages are not income.

CONCLUSIONS OF LAW

A. Petitioner's contention that he is not subject to New York personal income tax because he is not a United States citizen is fatuous as well as obviously incorrect. Petitioner was born in the United States and is therefore a citizen of the United States (***see***, US Const, 14th Amend, § 1; 8 USC § 1401[a]; Treas Reg § 1.1-1[a], [c]). Petitioner's wage income was properly subject to both Federal and New York State personal income tax (***see***, IRC § 1; Treas Reg § 1.1-1[a], [b]; Tax Law §§ 601, 611, 612). Furthermore, the position espoused by petitioner has been rejected and deemed frivolous by the Tax Appeals Tribunal and the Federal courts (***see***, ***Matter of Ellett***, Tax Appeals Tribunal, October 18, 2001; ***Matter of Lang***, Tax Appeals Tribunal, July 8, 1993; ***United States v. Grant***, 988 F2d 123 [9th Cir 1993]).

Petitioner's assertion at hearing that the issuance of refunds for the years at issue by the IRS constitutes an acceptance of his position is equally without merit. The issuance of such refunds was no more an acceptance of petitioner's position than was the initial issuance of refunds by the Division to petitioner in the instant matter.

B. Tax Law § 2018 authorizes the Tax Appeals Tribunal to impose a penalty "if any petitioner commences or maintains a proceeding in the Division of Tax Appeals primarily for delay, or if the petitioner's position in such proceeding is frivolous." Such penalty may be imposed on the Tribunal's own motion or on motion of the Office of Counsel of the Division of Taxation (20 NYCRR 3000.21). The maximum penalty allowable under this provision is $500 (Tax Law § 2018).

C. The position taken by petitioner in this proceeding is that he is not subject to New York personal income tax because he is not a United States citizen, notwithstanding that he was born in the United States and is a resident of New York. This position has no basis in fact or law and is therefore frivolous (***see***, ***Matter of Lang***, ***supra***).

D. Under the circumstances of this case, I find that a frivolous petition penalty of $500.00 is appropriate. I note that the Tax Appeals Tribunal has previously imposed a $500.00 frivolous petition penalty against this petitioner (***see***, ***Matter of Ellett***, ***supra***).

E. The petitions of James E. Ellett are in all respects denied and the notices of deficiency, dated January 18, 2000 and February 28, 2000, are sustained, and a penalty of $500.00 is imposed for the filing of a frivolous petition.

DATED: Troy, New York
November 29, 2001

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE